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In The

Supreme Court of the United States

October Term, 1993

JACQUELINE R. MORGAN,

Petitioner,

v.

JOHN S. FORD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

AMY S. GELLINS
Counsel of Record for Petitioner

LAW OFFICE OF AMY S. GELLINS
229 West Cloverhurst Avenue
Athens, Georgia 30605
(706) 353-1528

ALBERT M. PEARSON, III
Of Counsel to Petitioner

BUTLER, WOOTEN, OVERBY & CHEELEY
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under *Connick v. Myers*, 461 U.S. 138 (1983), does the First Amendment protect speech by an entry level public employee about sexual harassment directed at her and her co-workers where (a) she voiced the complaint in her own behalf *only* at the specific request of one of her superiors investigating sexual harassment directed at a co-worker; (b) she sought a departmental investigation into her own complaint *only* at the instigation of her superior; (c) she sought an *independent* investigation of her own complaint in accordance with established state procedure as posted at her place of employment; and (d) she never sought any job benefit other than an end to acts of sexual harassment?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

JACQUELINE R. MORGAN

Respondents:

JOHN S. FORD, TYDUS MEADOWS, CHARLES BURDEN, individually and in their official capacities as supervisors for the Georgia Department of Corrections.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. Introduction 7

II. The Eleventh Circuit Misapplied this Court's Decisions in *Givhan v. Western Line Consolidated School District; Connick v. Myers;* and *Rankin v. McPherson* 10

III. In Analyzing and Applying the *Connick v. Myers* Public Concern Standard, The Courts of Appeals Have Applied Divergent Tests and Reached Seriously Inconsistent Results 19

A. Decisions in Conflict with *Morgan* 20

B. Decisions Compatible with *Morgan* 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Cox v. Louisiana, 379 U.S. 559 (1965) 9, 18

Florida Star v. B.J.F., 491 U.S. 524 (1989) 18

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979) ..... *passim*

Harris v. Forklift Systems, 510 U.S. ___, 114 S.Ct. 367 (1993) 8, 27, 28

Pickering v. Board of Education, 391 U.S. 563 (1968) *passim*

Raley v. Ohio, 360 U.S. 423 (1959) 18

Rankin v. McPherson, 483 U.S. 378 (1987) *reh. denied* 483 U.S. 1056 (1987) 9, 10, 15, 16, 17

Thornhill v. Alabama, 310 U.S. 88 (1940) 21

CIRCUIT COURTS OF APPEAL CASES

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991) 25

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) 25

Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989) 25

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) 21

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 25

TABLE OF AUTHORITIES – Continued

Page

Brown v. City of Trenton, 867 F.2d 318 (6th Cir. 1989) 24

Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1986) 23, 24

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 657 (1991) 26, 27

Gonzales v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) 22

Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) 25

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 21

Kurtz v. Vickrey,, 855 F.2d 723 (11th Cir. 1988) 25

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) 24

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) 21

Morgan v. Ford, et al., 6 F.3d 750 (11th Cir. 1993) *passim*

O'Connor v. Steeves, et al., 994 F.2d 905 (1st Cir. 1993), *cert. denied sub nom, Town of Nahunt, Mass. v. O'Connor*, ___ U.S. ___, 114 S.Ct. 634 (1993) .. 19, 20

Peterson v. Atlanta Housing Authority, 998 F.2d 904 (11th Cir. 1993) 25

Piesco v. City of New York, Dept. of Personnel, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) 25

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

Saulpaugh v. Monroe Community Hospital, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189 (1994) 19, 25, 26, 27

Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990) 22

Versarge v. Township of Clinton, New Jersey, 984 F.2d 1359 (3d Cir. 1993) 21

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993), *cert. denied sub nom, White Plains Towing Corp. v. Wright*, ___ U.S. ___, 114 S.Ct. 185 (1993) 25

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993) 19, 21, 22

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 22, 23

Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1988) 25

CONSTITUTIONAL PROVISIONS

First Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 8

STATUTES

18 United States Code 241 8

28 United States Code 1254 2

28 United States Code 1291 2

TABLE OF AUTHORITIES – Continued

Page

28 United States Code 1331 2

28 United States Code 1343 2

42 United States Code 1983 ..... 2, 3, 7

O.C.G.A. Section 16-5-20 8

O.C.G.A. Section 16-5-23 8

O.C.G.A. Section 16-5-41 8

O.C.G.A. Section 42-5-36 17

O.C.G.A. Section 45-19-20 *et seq.* 6, 17

OTHER AUTHORITIES:

Stephen Allred, *From Connick to Confusion, The Struggle to Define Speech on Matters of Public Concern*, 64 Ind.L.J. 43 (1988) 20

Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1 (1990) 19

Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S.Cal.L.Rev. 3 (1987) 20

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PETITION FOR WRIT OF CERTIORARI

The petitioner, JACQUELINE R. MORGAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals for the Eleventh Circuit was entered on November 9, 1993, (A 3) and is reported at 6 F.3d 750 (11th Cir. 1993). Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*. The Eleventh Circuit Court of Appeals entered an order denying this petition on January 28, 1994. (A 1) *See* 15 F.3d 1099 (11th Cir. 1994).

JURISDICTION

This cause arose under 42 *United States Code* Section 1983. The United States District Court for the Northern District of Georgia had jurisdiction under 28 *United States Code* Sections 1331 and 1343. On August 19, 1991, the district court granted in full respondents' motion for summary judgment. The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause under 28 *United States Code* Section 1291. Jurisdiction of this Court is invoked under 28 *United States Code* Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1984, petitioner was hired as a Correctional Officer by the Georgia Department of Corrections. She was assigned to provide security at the Augusta Correctional and Medical Institute (ACMI) until her constructive discharge in April, 1988. Petitioner served under respondent Ford's direct supervision for two periods between 1985 and 1988. The Superintendent at ACMI was respondent Charles Burden.

Throughout petitioner's employment, Ford made sexually suggestive comments to her. For instance, Ford told her that she "had not had a real man until she had" him. Ford also said that Superintendent Burden had told him [Ford] that he "couldn't get his paycheck and his pussy in the same place," but that what Burden "did not know would not hurt him." Ford made constant requests for dates, and when refused, Ford threatened her: "There is a thin line between love and hate, and one day [Morgan] was going to realize that [she] loved" him.

In September, 1987, petitioner returned from military leave. About this time, Sheila Parrish, another female corrections officer, made sexual harassment claims against Ford. Previously, the petitioner, Parrish and other female employees had discussed Ford's sexual harassment, but had not brought it to Superintendent Burden's attention. They were extremely concerned about retaliation. Ford previously had "gotten in [Morgan's] face" and threatened that if she told of his harassment, "nobody was going to believe [her]."

After Superintendent Burden posted a bulletin "about sexual harassment in the workplace," however, Parrish overcame her reluctance to complain. The bulletin "explained what sexual harassment was, statements and innuendoes, and the number to call, which that number was the [State of Georgia's Office of] Fair Employment Practices number."

Once Parrish identified petitioner as a witness to Ford's sexual misconduct, Burden asked petitioner to meet him to discuss Ford's actions. During this meeting, Burden was immediately skeptical. Nonetheless, afterwards, Burden advised petitioner to go to the Department's Internal Affairs Section. Petitioner did so in accordance with procedures established for such matters. At no time did she seek favorable treatment such as a pay raise, transfer or a promotion. Along with Parrish and her co-workers, her goal was simply to stop Ford's sexual harassment.

Prior to her speech about Ford's misconduct, petitioner always had been viewed as a capable worker. She had never been disciplined. As soon as Ford learned of her meeting with Burden, however, petitioner's troubles got worse. Ford threatened petitioner that she "better stop this shit or else." Ford disciplined her for failing to

respond to an "officer needs assistance" call, despite witness testimony to the contrary. Ford also told other supervisors to write up petitioner whenever possible. These and other adverse actions all occurred while Internal Affairs was conducting its "investigation" of Ford.

Then, on October 9, 1987, respondent Burden joined the other supervisors in disciplining petitioner for her speech. Burden issued an official written reprimand.

> Recently, you came to my office for the purpose of providing supporting testimony to Officer Shiela [sic] Parrish's claim of sexual harassment by Lt. John Ford.
>
> During the interview with me [Supt. Burden] and with Interal [sic] Affairs Investigator Horne, you failed to establish any incident which would be considered sexual harassment either directed at you or Officer Parrish.
>
> This letter is a warning. You have made a serious charge against your supervisor but were unable to substantiate those charges. Your having done so is unprofessional, unethical, and deemed harassing in itself.
>
> While I will not tollerate [sic] sexual harassment in the workplace, I am equally protective of those wrongfully accused You are hereby warned against such future misconduct. Should misconduct of this nature reoccur disciplinary measures will be taken.

Burden also wrote a letter to Ford on the same day, clearing him of sexual harassment charges. The letter, however, cautioned Ford about his "admitted personal conversation and remarks." Although Burden admonished Ford not to "plac[e] himself in a situation that could be perceived as personal," Burden took no other action.

Burden's premise was that no sexual harassment occurred because Ford made no demands for sexual favors.

During the following month, petitioner's difficulty with Ford continued to be severe. Ford took the highly unusual step of giving petitioner an interim job rating which was the lowest she had ever gotten while at the department. Finally, after being overwhelmed with adverse actions by department officials following her allegations against Ford, petitioner filed a charge of sexual harassment and retaliation with the Office of Fair Employment Practices ("OFEP"). An independent state agency, OFEP is responsible for investigating charges of discrimination.[1] Petitioner followed the procedures outlined in the bulletin that Burden previously had posted at ACMI.

When Ford learned of the OFEP investigation, he set out to make petitioner even more miserable.[2] The cumulative effect of Ford's misconduct and the subsequent vendetta caused her depression, anxiety and intimidation. This situation, made worse by the inherent stress of working in a prison, led to her resignation in April, 1988. Sheila Parrish, too, resigned from ACMI because of the harassment and retaliatory measures.

In late August, 1989, OFEP concluded its investigation of petitioner's charge. OFEP found cause to believe that Ford had discriminated against petitioner because of

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[1] O.C.G.A. Section 45-19-20 *et seq.*

[2] For example, Ford gave petitioner dangerous assignments for which she did not have proper certification. Petitioner also was assigned to the dorm with AIDS patients, and to the housing ward for violent inmates. Ford continued to comment about his "manhood." Petitioner's treatment was so calculatedly petty that she was denied sick leave when she was ill with the chicken pox.

her sex, and that the department had retaliated against her for opposing Ford's misconduct. Sheila Parrish received a similar finding.

Petitioner filed suit under 42 *United States Code* Section 1983, claiming that the respondents had violated her First Amendment right to freedom of speech, as applied to the states by the Fourteenth Amendment to the United States Constitution. Following discovery efforts, respondents moved for summary judgment on all claims. The district court granted the motion in full. On appeal, the Eleventh Circuit rejected petitioner's first amendment contention.[3] The Court reasoned that petitioner had not "gone public" with her speech, and that she had spoken "primarily as an employee in an effort to improve her own working conditions," and "not as a citizen on matters of public concern."

REASONS FOR GRANTING THE WRIT

I. Introduction

The Court should grant the petition because the Eleventh Circuit's decision in *Morgan* presents the "special and important reasons" needed to justify the writ of certiorari. Supreme Court Rule 10.1.

Morgan's speech regarding sexual harassment by her prison supervisor addressed a significant issue of misconduct in the workplace generally. Not only is sexual harassment a civil or tort-like wrong under both federal

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[3] Petitioner also filed a claim against the Georgia Department of Corrections under Title VII of the Civil Rights Act of 1964, alleging sexual harassment and retaliation for opposing discriminatory practices. The Eleventh Circuit reversed the district court's grant of summary judgment on petitioner's Title VII constructive discharge claim, and that issue is not before this Court.

and Georgia law, it is misconduct often threatened or carried out by criminal means. *See, e.g.*, O.C.G.A. § 16-5-20 (simple assault); O.C.G.A. § 16-5-23 (simple battery); O.C.G.A. § 16-5-41 (false imprisonment); 18 U.S.C. § 241 (general civil rights conspiracy statute). Individual resistance to and exposure of such misconduct is therefore a matter of overriding public concern wherever it happens. Where, as here, the state is implicated in the misconduct, the vindication of a core constitutional right under the Fourteenth Amendment is at stake. *See Connick v. Myers*, 461 U.S. 138, 146 (1983); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

While this Court only recently reaffirmed its vigorous commitment to protect the victims of workplace sexual harassment, *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 114 S.Ct. 367 (1993), the Eleventh Circuit decision undermines that commitment by blunting one of the most effective tools of self-protection available to working women such as Jacqueline Morgan: freedom of speech. This right, as petitioner conceives it, includes the right to discuss with fellow employees the occurrence of illegal or criminal acts in the workplace, and the concomitant right to report such acts to persons or agencies officially designated by the state for dealing with them. The fact that this case involves allegations of sexual harassment – which were deemed credible by the only *independent* state agency which investigated them – adds a sense of urgency to petitioner's first amendment argument. That dimension, however, is not analytically critical to the first amendment principle involved.

By asserting the primacy of *Connick* at the expense of *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Eleventh Circuit's decision places an exaggerated – and extraordinarily unfair – emphasis on petitioner's failure to "go public" with her sexual harassment charges. As

will be demonstrated, that emphasis conflicts sharply with this Court's decisions in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979); *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983); and *Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Supreme Court Rule 10.1(c). It also conflicts with this Court's decisions suggesting that the state cannot create a public forum and then punish those who use that forum properly to communicate about subject matter protected by the First Amendment. *See Cox v. Louisiana*, 379 U.S. 559 (1965); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

In addition, while the Eleventh Circuit in *Morgan* along with several other courts have recognized that "sexual harassment in the workplace is a matter of important social interest," some courts nevertheless seem driven to probe deeply – petitioner would say subjectively – into the alleged personal motive. Under this restrictive view of *Connick*, even if speech can fairly be described as addressing a matter of public concern, it can lose first amendment protection because a complainant has a personal interest in the subject. Thus, only the truly altruistic and the openly heroic are constitutionally worthy.[4] Again, as will be shown, consideration of this amorphous factor under the *Connick* "content, form and context" analysis has resulted in conflicting lower court decisions which distort and undermine the relationship between *Connick* and the balancing analysis

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[4] Petitioner is mindful of the risks of issuing a challenge to respondents, but she does not believe that they can cite to a single decision of this Court where the existence of a personal stake in the outcome of a controversy has ever deprived the speaker or writer of first amendment protection. Were it not for the cases that have so misconstrued *Connick*, petitioner doubts that any such cases could be found in the lower courts as well.

called for under *Pickering*. Supreme Court Rule 10.1(a).

The intervention of this Court is urgently needed to resolve the doctrinal tension that is present in this important area of first amendment jurisprudence. As the law presently stands, no attorney – whether representing a prospective plaintiff or defendant – can explicitly advise a client about liability, settlement or the hazards of trial. As the "public concern" standard was construed by the Eleventh Circuit, vastly too much depends on the trial judge's predelictions and linguistic facility, and far too little on the concrete circumstances associated with workplace expression.

II. The Eleventh Circuit Misapplied this Court's Decision in *Givhan v. Western Line Consolidated School District; Connick v. Myers;* and *Rankin v. McPherson*

The *Morgan* panel refused to protect plaintiff's speech on a vital matter of public concern allegedly because she did not "attempt to make the concerns public":

> The speech that Morgan cites is in the form of complaints to *official bodies* – the Superintendent of ACMI, Internal Affairs, and the Office of Fair Employment Practices. She did not relate her concerns about sexual harassment to the public or attempt to involve the public in any manner. Morgan's expressions 'in no way drew the public at large or its concerns into the picture.' *Pearson v. Macon-Bibb County Hospital Authority*, 962 F.2d 1274, 1279 (11th Cir. 1992).

Morgan, 6 F.3d at 754-55 (emphasis added). In a footnote, the Eleventh Circuit tried to downplay the importance of

this consideration, describing it only as a "relevant factor." *Id.* at 754 and n.5. In actuality, however, the court gave it dispositive weight.

To pass first amendment muster as the Eleventh Circuit reads *Connick*, a public employee must pursue a course of action that will intensify workplace antagonism, will make dispute mediation far less likely and will heighten – not lessen – the employee's vulnerability under the *Pickering* balancing analysis if a lawsuit results. For many public employees, this view of *Connick* is a prescription for suffering in silence. Few will be bold enough to undertake the economic, professional and personal risks demanded by the Eleventh Circuit if the first amendment does not offer a safe harbor for the private, yet respectful, articulation of publicly important workplace grievances.

This is contrary to all of the Court's relevant precedent.

For example, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979), this Court considered whether an employee's speech about race discrimination in public employment, made in a private meeting with her supervisor, was protected by the First Amendment. 439 U.S. at 415-16. The former Fifth Circuit Court of Appeals had concluded that "because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected. . . . " *Id.* at 413. Reversing the Fifth Circuit, this Court recognized an important point:

> . . . *Pickering*, *Perry*, and *Mount Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the

> rule to be derived from them is not dependent on that *largely coincidental fact.*

Id. at 414 (emphasis added).

Not to be overlooked in *Givhan* is the important fact that the teacher, a black woman, complained about racial discrimination in a school that had recently been subject to a district-wide desegregation order. Her complaints were not general in nature, but, in part, were related to "employment policies and practices" at the very school where she taught. She apparently believed these policies and practices to be racially discriminatory in purpose or effect. This Court was notably unconcerned with whether the plaintiff might in some way benefit personally, professionally or economically if her complaints or criticisms were acted upon favorably. This crucial aspect of *Givhan* was ignored by the Eleventh Circuit.

In *Connick v. Myers,* 461 U.S. 138, 140, 148 (1983), the first amendment issue stemmed from an office dispute concerning a transfer. Myers, an unhappy assistant faced with a transfer she did not want, drafted and circulated a questionnaire to her co-workers about the handling of transfers generally. She was discharged for insubordination. The Court's primary purpose in *Connick* was to clarify the public concern standard first enunciated in *Pickering.* No Justice in *Connick* questioned *Givhan.*

It is highly significant that on the public concern issue, this Court in *Connick* gave no weight to the fact that the plaintiff circulated the questionnaire wholly within the office and only to co-workers. If this had been a "relevant" or potentially dispositive factor, then the Court could have ruled the entire questionnaire to be unprotected expression on that basis alone and reversed without further discussion. The Court instead focused on the objective content of the questionnaire. For all but one of its questions, the objective content was enough to hold

that they "were extensions of [the plaintiff's] dispute over her transfer to another section of the criminal court." *Id.* at 149. To that extent, this Court held, they did not address a matter of "public concern" and the First Amendment did not protect them. This analysis is consistent with the objective content emphasis in *Givhan*.[5]

One question on the questionnaire at issue in *Connick*, however, did "[touch] upon" a matter of public concern.[6] The now well known question 11 asked whether assistant district attorneys "ever felt pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149. Describing such pressure as "a coercion of belief in violation of fundamental constitutional rights," the Court found the issue to be "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without

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[5] It is important to note that in *Givhan*, the remand was not for an application of the *Pickering* balancing test. On that subject, the Court observed that under *Pickering*, private speech on a matter of public concern would be assessed in terms of the "manner, time and place in which it is delivered." *Givhan*, 439 U.S. at 415 n.4. Nothing in *Connick* altered this fundamental proposition.

[6] The use of the phrase "touched upon" was not a casual choice in *Connick*. 461 U.S. at 149. The phrase reflects what is more or less a presumption – fostering reasonable breathing space for first amendment values – that workplace speech satisfies the "public concern" standard if the speech, *even in part*, is a "matter of interest to the community" at large. *Id.* The phrase is also consistent with the observation in *Connick* that speech loses first amendment protection *only* when it refers to "matters . . . of personal interest." *Id.* at 147. The Eleventh Circuit decision below radically distorted this part of *Connick* in holding that any semblance of personal interest defeated petitioner's free speech claim.

fear of retaliatory reprisal." *Id.* Based on those considerations, the Court proceeded to undertake the "manner, place and time analysis" required under *Pickering*. *Id.* at 149-154. Again, this approach in no way departed from anything said in *Givhan;* indeed, it was undertaken in *Connick* in explicit reliance upon footnote 4 in *Givhan*. 461 U.S. at 153-54.

It is difficult to fathom how freedom from the coercion of sexual harassment in the workplace could be any less a matter of interest to the community than political coercion – particularly where state actors are culpable. On that basis alone, the petitioner would appear to have met the *Connick* public concern standard. The Eleventh Circuit opinion, however, completely ignores this aspect of *Connick* and substitutes what is essentially an *ad hoc* inquiry into whether an employee aired her concerns publicly. This inquiry is plainly and simply not a part of the public concern analysis under *Connick*. The Eleventh Circuit took a factor relevant to the *Pickering* balancing analysis (and only to that) and realigned it under the public concern test.

This approach is genuinely pernicious. The bright line for the Eleventh Circuit turns on whether a plaintiff goes public with her crusade. Granted, this bright line has the virtue of being an "objective" standard. It is simply the wrong bright line. It is far less speech protective than the "objective" test actually articulated in *Givhan* and *Connick*.

As a general proposition, the privateness of expression will work in favor of the first amendment claimant under the *Pickering* "manner, time and place" inquiry as clarified by *Givhan* and *Connick*. Yet, if the Eleventh Circuit's approach is constitutionally correct, then this same factor will weigh heavily against a first amendment claimant's effort to satisfy the public concern standard.

The Eleventh Circuit's inversion of the reasoning in *Connick* creates an unnecessary and false tension in the jurisprudence of workplace first amendment rights. Worse still, it substantially diminishes the scope of first amendment protection for public employees in a manner not contemplated by this Court in *Givhan* or *Connick*.

It remains a mystery why the Eleventh Circuit did not attach more importance to *Rankin v. McPherson*, 483 U.S. 378 (1987), which was decided four years after *Connick v. Myers*. *Rankin* seemingly put to rest the public versus private expression distinction. An employee of a county constable's office, upon hearing of the unsuccessful attempt to assassinate then-President Reagan, stated to her boyfriend: " . . . if they go for him again, I hope they get him." This remark was overheard by another employee who reported the remark to the constable. The constable called the plaintiff to his office, confirmed that she had made the remark, and fired her. *Rankin*, 483 U.S. at 381-382.

The *Rankin* Court specifically rejected the Government's contention that the private nature of the statement vitiated "the status of the statement as addressing a matter of public concern." *Id.* at 387, n.11. As the Court observed:

> Vigilance is necessary to ensure that public employees do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of employees' speech.

Id. at 384. The Court held that the content of the statement, made during a discussion of Reagan Administration policies, was a matter of public concern. From there, the Court proceeded to the balancing analysis required by *Pickering* and upheld the first amendment claim in all respects. *Id.* at 388-392.

All Justices in *Rankin* appeared to agree that an objective standard determines whether speech is a matter of public concern. The four *Rankin* dissenters, led by Justice Scalia, opposed what they perceived to be the majority's blurring of objective and subjective factors under *Connick*. Specifically, Justice Scalia strongly chided the majority for impermissibly injecting the motive of the speaker into first amendment analysis:

> [McPherson's political] criticisms merely reveal[ed] the speaker's motive for expressing the desire that the next attempt on the President succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for the crime.

483 U.S. 396-397. In Justice Scalia's view, the motive for speech must be kept distinct from its objective content which, in *Rankin*, pointed toward low value, unprotected speech – at least in the public workplace. In short, a good motive cannot save objectively unprotected speech from sanction. Petitioner suggests that the converse is equally true: a bad motive cannot be used to deprive objectively protected speech from full first amendment protection.[7] This proposition is arguably well settled by the Court's workplace free speech decisions.

Yet, the Eleventh Circuit's use of personal motive to hold against petitioner below is a clear inversion of the first amendment methodology of *Givhan*, *Connick* and

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[7] In this regard, the Eleventh Circuit begrudgingly acknowledged that when petitioner spoke on behalf of a co-worker, the speech contained a "public concern aspect." *Morgan v. Ford*, 6 F.2d 750, 755 (11th Cir. 1993). This part of petitioner's speech simply was not enough to make it the "primary" purpose. Petitioner submits that there is no basis in this Court's decisions for the "primary" purpose corollary to the public concern standard.

Rankin. These decisions establish that when speaking on a matter of public concern, the speaker's forum is immaterial to the public concern inquiry. Despite this precedent, the *Morgan* panel held that while the petitioner's motives were pure, they were not pure enough for first amendment protection, because petitioner did not "attempt to involve the public in any manner."[8] This statement not only misstates the law, it is factually erroneous as well.

Petitioner indeed made her sexual harassment concerns public. She did so in a manner directed by the state and did so precisely in accordance with those directives. More important, these procedures were established by the state for the very reasons that underlie this Court's balancing analysis under *Pickering:* to promote efficiency and to minimize disruption in the workplace. First, at the specific request of the prison superintendent who was investigating a co-worker's sexual harassment complaint, petitioner told him what she knew. Then, at the superintendent's specific suggestion, petitioner took her own sexual harassment complaints to the Internal Affairs Section.[9] Finally, exactly in accordance with the bulletin posted at ACMI, she filed under oath a charge of discrimination and retaliation with the official state Fair Employment Practices agency.[10]

In this respect, petitioner went public with her sexual harassment concerns in three distinct fora made available by the state for the purpose of hearing discrimination complaints. The notion of having to go public to satisfy the public concern standard represents a comic book view of the First Amendment. For reasons understandable to

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[8] *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir.1993).

[9] *See* O.C.G.A. Section 42-5-36.

[10] *See* O.C.G.A. Section 45-19-20 *et seq.*

anyone who has ever been in a subordinate position in the workplace (which includes just about everybody), petitioner took the procedurally approved course. Yet, having extended this invitation to petitioner and opened the fora to hear her complaints, the state now denies that the subject matter of petitioner's complaints is a matter of public concern.

Contrary to what the Eleventh Circuit held, the state cannot entice and punish at the same time. For example, in *Cox v. Louisiana*, 379 U.S. 559, 569-571 (1965), the appellant was convicted under a Louisiana statute making it a misdemeanor to picket or parade "in or near" a courthouse. Law enforcement officials at the scene told civil rights demonstrators that they could demonstrate across the street from the courthouse. Relying on this, the demonstrators assumed that they would not be in violation of the statute. They were wrong. The Supreme Court reversed appellant's conviction on the ground that to do otherwise "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.* at 571 *quoting Raley v. Ohio*, 360 U.S. 423, 426 (1959). The rationale of *Cox v. Louisiana* applies to petitioner's case.

Much more recently, the Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), overturned an invasion of privacy judgment against a newspaper for publishing the name of a rape victim in violation of a Florida criminal statute. *Id.* at 527-528. One of the major factors in the Court's reasoning was the police department's distribution of a press release naming the victim. In reliance on that, the newspaper reported the name. This Court was greatly concerned about the state placing information in

the public domain and then permitting an invasion of privacy lawsuit against a newspaper for reporting public domain information. *Id.* at 535-536. As suggested in *Cox*, the state's conduct smacked of entrapment.

Although the opportunity to grant the writ on the private speech/personal interest issue has presented itself in several recent cases, this Court has passed each time. *See, e.g., Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189 (1994); *O'Connor v. Steeves, et al.*, 994 F.2d 905 (1st Cir. 1993), *cert. denied, sub. nom Town of Nahunt, Mass. v. O'Connor*, ___ U.S. ___, 114 S.Ct. 684 (1993); *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993). The circuit courts are now in fundamental conflict on *Connick* and the probability of a shift toward greater doctrinal uniformity is remote. This Court's detachment has contributed to the disarray. Continued hesitation will only make matters worse.

III. In Analyzing and Applying the *Connick v. Myers* Public Concern Standard, The Circuit Courts Have Applied Divergent Tests and Reached Seriously Inconsistent Results

Many circuit courts recognize that speech regarding workplace sexual harassment is a matter of public concern; yet, these courts have reached conflicting decisions on whether speech is constitutionally protected based upon the weight given to the plaintiff's "motive" in speaking.[11]

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[11] Several legal scholars have addressed this conflict, and have emphasized the need for clarification in order to vindicate free speech rights on matters of public concern. *See, e.g.*, Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1,

A. Decisions in Conflict with *Morgan*

There are numerous circuit court decisions in conflict with the Eleventh Circuit's holding in *Morgan*. The Fifth and the Tenth Circuits provide perhaps the leading examples.[12]

36-39 and nn.210-225 (1990) ("*Connick* seems to require that in order to secure the status of speech on matters of public concern, grievances be purged of the taint of self-interest, and be distilled into a generalized political or social commentary or demand for reform . . . The *Connick* formula systematically denigrates the importance of the particular grievance to generating public concern over an issue. As such, it deprives each individual self-interested speaker of the very legal protections she may need in order to discover and join those who share her concerns . . . "); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S.Cal.L.Rev. 3, 20-24 and nn.95, 100-104 (1987) (" . . . In numerous post-*Connick* cases, the lower courts have concluded that the employee speech in question was personal and therefore not protected. [citations omitted] . . . The message of the case law on public employee speech is disconcerting . . . The decisions encourage workers to carry their grievances to outside fora – to newspaper, public meetings, television, or other similar avenues – even though publicity could fan into flames an ember that might have been doused quickly and quietly within the workplace. The decisions also discourage workers from speaking up on the topics, and in the manner, most likely to occur to them: on internal, work-related problems expressed to a co-worker or supervisor during the work days . . . ;") *see also* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind.L.J. 43 (1988).

[12] The Eleventh Circuit's holding in *Morgan* concerning "motive" in speaking is at odds with the analytical approach generally taken by the Courts of Appeals for the First, Third, Fifth, Ninth, Tenth and District of Columbia Circuits. **First Circuit:** *O'Connor v. Steeves, et al.*, 994 F.2d 905, 913-915 and nn.4-6 (1st Cir. 1993), *cert. denied, sub nom Town of Nahunt, Mass v. O'Connor*, ___ U.S. ___, 114 S.Ct. 634 (1993) (Court addressed the

In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993), a case very similar factually to *Morgan*, the Fifth Circuit Court of Appeals reached the opposite result. Wilson was an officer with the University of Texas Health Center's (UTHC) police force. She alleged that officials demoted and discharged her for reporting sexual harassment within the health center's police force against herself and other co-employees. 973 F.2d at 1265-1266. At trial, the

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"threshhold" issue under *Connick* of whether O'Connor's allegation of official misconduct against Steeves, an elected official, was speech on a matter of public concern; discussed the varying approaches taken by other Courts of Appeals; and found that its precedent supported the "content-based" approach, and where an employee's speech involved an "inherent matter of public concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the form and context of the expression"); and *Brasslett v. Cota*, 761 F.2d 827, 844 n.14 (1st Cir. 1985); **Third Circuit:** *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-1202 (3d Cir. 1988) (" . . . Dismissing Rode's speech about racial discrimination as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out . . . "); *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1339, 1365 (3d Cir. 1993) ("the law in this circuit is that motivation is merely one factor to be considered . . . in assessing the character of the [employee's] speech"); **Ninth Circuit:** *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection) *quoting Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); **District of Columbia Circuit:** *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988) (speech about alleged violations of NCAA and University rules may be protected even if the speech reflected "job-related disagreements.")

district court ruled that Wilson's speech did not involve a matter of public concern. *Id.* at 1268.

The Fifth Circuit reversed and remanded for a jury trial.[13] The court reasoned:

> The content of Wilson's speech – reports of sexual harassment perpetrated on her and other women at UTHC – is of great public concern. *Cf. Connick*, 461 U.S. at 148, n.8 (plaintiff's constitutional 'right to protest racial discrimination [is] a matter inherently of public concern,' *citing Givhan v. Western Consolidated School District*, 439 U.S. 410, 415-16 (1979) . . .
>
> *Connick* 'hold[s] only that when a public employee speaks *not* as a citizen upon matters of public concern, but *instead* as an employee upon matters of personal interest,' the First Amendment does not protect the employee from disciplines for speaking 461 U.S. at 147 (emphasis added). The words 'not' and 'instead' in this key statement can only mean that the Court removed from First Amendment protection only that speech that is made only as an employee, and left intact protection for speech that is made both as an employee and as a citizen.

Wilson, 973 F.2d at 1269-1270 (emphasis in original).[14]

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the court reviewed a police officer's claim that he was fired for writing the State Attorney General seeking an

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[13] The Fifth Circuit's analysis in *Wilson* is consistent with its earlier decisions. *See, e.g., Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir. 1990) and *Gonzales v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

[14] The *Wilson* Court also recognized that Wilson's speech was protected under *Givhan* even though she had chosen an "internal forum" in which to express her concerns. *Id. citing Givhan*, 439 U.S. at 415-16 (other citation omitted). This portion of the opinion, too, stands in stark contrast to *Morgan*.

investigation. Wulf's letter had included allegations of misuse and misappropriation of public funds and sexual harassment of a female officer. *Id.* at 857. The *Wulf* court concluded "that the content of Wulf's letter strongly supports a finding of public concern," and that "the form and context of the letter also support such a finding." *Id.* at 860, n.26. It specifically rejected the claim that the letter was a "mere extension of a personnel dispute" and that the context of Wulf's speech showed that it "arose out of Wulf's displeasure at being transferred . . . and was the culmination of a personal vendetta by Wulf against [defendant] LaMunyon." *Id.*

Finding that the speech addressed a matter of public concern, the *Wulf* court noted:

> [E]ven the questionnaire in *Connick*, which the Court viewed as simply an extension of a personal dispute between employer and employee, contained one matter of public concern. Similarly, Wulf's letter, while arguably linked to some degree to his personal dispute with LaMunyon and to his dissatisfaction with his transfer to the Records Department which he viewed as retaliatory, contains allegations of public concern. *Id.* at 860.

B. Decisions Compatible with *Morgan*

In focusing upon the "point" of Morgan's speech instead of the "content, form and context, as revealed by the whole record," the Eleventh Circuit embraced reasoning that generally has been applied by the Courts of Appeals for the Second Circuit, the Sixth Circuit, and most notably, the Seventh Circuit. *See Morgan*, 6 F.3d at 754-755 *citing Callaway v. Hafeman*, 832 F.2d 414, 417 (7th

Cir. 1986) and *Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir. 1993).[15]

In *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), the Seventh Circuit denied first amendment protection to speech about sexual harassment that the plaintiff personally had experienced. It defined the standard as follows:

> While it is undoubtedly true that incidences of sexual harassment in [public employment] are inherently matters of public concern, the *Connick* 'test requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?' *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (other citations omitted).

Callaway, 832 F.2d at 417. After purporting to review the content, form and context of Callaway's statements, the Seventh Circuit concluded that her concern was "personal, not public." *Id.* The court reasoned that Calloway had always tried to keep her complaints confidential, and that her communications were made in a context relating to the resolution of a "personal dispute." *Id.*

Although the Seventh Circuit usually has viewed the factor of a "personal stake in the outcome" as

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[15] *See also Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989) (court denied first amendment protection to an employee's letter of protest to his police chief about a perceived lack of support of the emergency response team, advising that when applying *Connick's* factors of content, form and context, if the Court found that the "employee's personal interest *qua* employee predominates over any interest he might have as a member of the general public, we are not to intercede.")

determinative,[16] there is evidence of intra-circuit conflict among its decisions. Some Seventh Circuit cases reject undue emphasis on motive under *Connick*, and instead, focus upon the objective content of the speech. *See, e.g., Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) *(en banc), cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991); *Breuer v. Hart*, 909 F.2d 1035, 1038-1039 (7th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1264 (7th Cir. 1988); *Berg v. Hunter*, 854 F.2d 238, 242-243 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). In this respect, the Eleventh and Seventh Circuits are similar, although the intra-circuit conflict parallel is no doubt unintentional. *See, e.g., Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 915-916 (11th Cir. 1993); *Kurtz v. Vickrey*, 855 F.2d 723, 727-729 (11th Cir. 1988).

In *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 142 (2d Cir. 1993), the Court denied first amendment protection to a hospital employee who claimed her discharge was for complaining about a supervisor's sexual harassment.[17] The *Saulpaugh* court stated that if the

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[16] *See, e.g., Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 420 (7th Cir. 1988); *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990).

[17] *See also White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 184 (1993) ("Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight in the [*Pickering*] balancing analysis"); *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1157 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) (" . . . It also is apparent that this case can be readily distinguished from those cases where a disgruntled employee voluntarily comments on an employment-related matter out of a personal interest") (citations omitted).

plaintiff's complaints had been about "system-wide discrimination, they would have unquestionably involved a matter of public concern." *Id.*

> Here, however, there has been no violation of the First Amendment because Saulpaugh's complaints were 'personal in nature and generally related to her own situation.'. . . . Although evidence was subsequently uncovered that Rosemond had also sexually harassed a prior employee, Saulpaugh's complaints, like those in *Ezekwo* and *Yatvin*, were motivated by and dealt with her individual employment situation. (citations omitted).

Saulpaugh, 4 F.3d at 142-143.

Significantly, however, Chief Judge Newman wrote separately to state his views that the "Circuit's law concerning the First Amendment rights of public employees has evolved too hastily and too narrowly . . . " *Id.* at 146.

> [The question arises] whether the speech of a public employee must be placed in either the 'public concern' or the 'personal interest' categories, or whether, in an appropriate case, it may be placed in both categories, drawing First Amendment protection to the extent that the speech is a matter of 'public concern.' The Fifth Circuit has ruled that a public employee's speech may fall into both of the *Connick* categories. In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992) *cert. denied* ___ U.S. ___, 113 S.Ct. 1644 (1993), the Court said that the Supreme Court in *Connick* had 'removed from First Amendment protection only that speech that is made only as an employee and left intact protection for speech that is made both as an employee and as a citizen.' *Id.* at 1269. . . .
>
> I think the Fifth Circuit's reading of *Connick* is correct. In describing the category of 'private interest' matters that do not receive First

> Amendment protection, the Supreme Court was careful to limit its ruling to 'ordinary dismissals from government service which violate no . . . applicable statute.' *Connick*, 461 U.S. at 146. A dismissal in violation of Title VII is a matter of 'public concern,' and an employee who protests that her discharge violates Title VII is speaking about a matter of 'public concern' and a matter of 'private interest.'
>
> Nevertheless, I am obliged to acknowledge that our Circuit has adopted the position taken by the Seventh Circuit, albeit without explicitly recognizing the two lines of conflicting authority, much less articulating a basis for preferring the Seventh Circuit's conclusion. *See Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d at 780-81. . . .
>
> Though regretting our narrow view of First Amendment protection, I am bound by *Ezekwo* and therefore concur in the Court's opinion.

Saulpaugh, 4 F.3d at 146-147 (Newman, Chief Judge, concurring).

CONCLUSION

Sexual harassment in the workplace is a pervasive problem, which affects and undermines the efficiency of businesses everywhere and the services that they provide. In *Harris v. Forklift Systems*, 510 U.S. ___, 114 S.Ct. 367 (1993), this Court forcefully stated:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that

> it created a work environment abusive to employees, because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality.

114 S.Ct. at 370-371.

Despite the Supreme Court's message in *Harris*, the opinion in *Morgan* – issued, ironically, on the very same day – will have the opposite effect. It will be cited to claim that courts should not protect plaintiffs if they oppose sexual harassment but do not go "public." Also, by refusing to protect speech made [only] to "official bodies," the opinion will discourage employees from expressing their concerns internally, thereby denying the employer a chance to address the misconduct before the allegations are broadcast – which then may cause even greater problems. Indeed, at a time when courts are stressing the need for alternative dispute resolution, *Morgan* will compel the contrary, undesirable result.

Morgan further overlooks the reality of the workplace, and the certain conclusion that most employees will simply remain silent about official misconduct or breach of duty rather than "rock the boat." This holding surely will keep employees from speaking about matters of public import – except for the few who are bold enough or financially secure enough to "go public," and inevitably, to risk their jobs in order to tell the truth for the greater good.

The notion that personal motive might despoil the first amendment claim in *Morgan* is especially unfair. The petitioner is truly an average working woman, drawing a paycheck and doing what she can to make ends meet. She sought neither favors nor compensation when encouraged to air her complaint. She sought only to end illegal and unconscionable actions by a state official. She followed the procedures that the state created for hearing

sex discrimination complaints. She did everything right and yet she was punished and ultimately, forced to give up her chosen career.

The Eleventh Circuit's trivialization of the First Amendment in *Morgan* is especially ironic. Petitioner was an employee of the Georgia Department of Corrections. It is a state agency that has been devastated by a scandal involving not only the sexual harassment of female workers but also female inmates.[18] Criminal prosecutions

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[18] The media has covered extensively the sex scandal within the Department of Corrections. *See e.g.*, **Atlanta Journal and Constitution:** "Prison Sex Scandal Won't Fade Away; Costs Still Climb, Even as Contracts Inked for Movies," March 14, 1993 ("[15 people] await trial on felony charges ranging from sexual assault . . . to rape and aggravated sodomy. A warden was fired and another demoted. 12 people have been transferred, suspended, fired or quit . . . Corrections Department officials have waged a vigorous public relations campaign with the media . . . But as much as they would like to, corrections officials cannot readily lay the scandal to rest . . . So far, the case has cost taxpayers about $5 million in attorneys' fees, renovation and new personnel and programs. The price is likely to increase by millions more as the case progresses to criminal and civil trials. "There was open hostility toward and abuse of women, both inmates and employees, condoned and participated in by top officials," said Kathie McClure, an attorney for an inmate. "The inmates were treated like animals. The female employees were treated like second-class citizens." But the department says if that was the case, it was allowed to happen because no one knew . . . ;" *see also* **Chicago Tribune,** "Assault Charge: Inmates Accuse Prison Workers of Misconduct," May 24, 1992; and **The Dallas Morning News,** "Female Inmates' Sex-Abuse Suit Rocks Georgia's Prison System," March 12, 1994 (" . . . At the state's request, the Justice Department also has begun investigating possible civil rights violations . . . Investigators from an all-male internal affairs unit looked into reported liaisons between inmates and prison staffers. But none of the reports was ever ruled to be confirmed . . . Under pressure

and civil suits have resulted. Employees have been fired and demoted. The Department now is doing much soul searching. If the first amendment right of employees to speak out on this matter had been protected, then maybe this "culture of abuse" in the Department of Corrections' workplaces would have been challenged sooner and more successfully.

Petitioner asks the Court to bring its wisdom to bear on this problem. *Connick* has become a favored trial court tool for disposing of cases easily and quickly on summary judgment. This phenomenon is far removed from the guiding rationale behind that decision.

For the reasons set forth, petitioner asks this Court to grant the writ and to reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

AMY S. GELLINS
Counsel of Record for Petitioner

LAW OFFICE OF AMY S. GELLINS
229 West Cloverhurst Avenue
Athens, Georgia 30605
(706) 353-1528

ALBERT M. PEARSON, III
Of Counsel to Petitioner

BUTLER, WOOTEN, OVERBY
& CHEELEY
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

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from lawyers, state corrections officials appointed a special investigator to check into the allegations. The findings astounded even the attorneys for the women. 'We found that many or most of the women were probably telling the truth . . . ' said Andie Moss, Deputy Commissioner."

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8816

JACQUELINE R. MORGAN,

Plaintiff-Appellant,

versus

JOHN FORD, Individually and in
his official capacity as an officer
of the Georgia Department of Corrections,
et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed Jan. 28, 1994)

Before: TJOFLAT, Chief Judge, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

Jacqueline R. MORGAN,
Plaintiff-Appellant,

v.

John FORD, Individually and in his official capacity as an officer of the Georgia Department of Corrections, Tydus Meadows, Individually and in his official capacity as an officer of the Georgia Department of Corrections; Chuck Burton, Individually and in his official capacity as an officer of the Georgia Department of Corrections; Robert Whitmore, in his official capacity as Commissioner of the Georgia Department of Corrections and Georgia Department of Corrections, Defendants-Appellees.

David Evans, etc., Defendant.

No. 91-8816.

United States Court of Appeals,
Eleventh Circuit.

Nov. 9, 1993.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

In this case, Jacqueline Morgan claims that she left her job with the Georgia Department of Corrections because three of her supervisors subjected her to sexual harassment in the workplace. She seeks an injunctive

order, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988), requiring the Department of Corrections to reinstate her to her position, with back pay and fringe benefits. Morgan also claims that when she exercised her First Amendment right of free speech and complained about the sexual harassment, these supervisors retaliated against her. Accordingly, she seeks compensatory and punitive damages against them, under 42 U.S.C. § 1983 (1988).

The district court found no merit in any of Morgan's claims, and therefore granted summary judgment against her. We agree with the district court's disposition of Morgan's section 1983 claims against the supervisors, and thus affirm that disposition. We vacate, however, the judgment for the Department of Corrections, and remand Morgan's case for reinstatement for further proceedings, because a material issue of fact remains to be litigated.

I.

Jacqueline Morgan went to work for the Georgia Department of Corrections (the Department) in 1984. The Department assigned her to the Augusta Correctional Medical Institute (ACMI); her position was Correctional Officer I (COI). Lieutenant John Ford, one of the defendants sued in this case, was her immediate supervisor. He supervised Morgan for two periods during her employment at ACMI: for her initial six months and for a time in 1987.

Soon after Morgan came to work, Ford directed Correctional Officer Kenneth Carswell to ask Morgan if she would be interested in going on a date with Ford. Morgan

told Carswell that she was not interested in seeing Ford socially.

Upon receiving this response, Ford told Morgan that she "had not had a real man until she had him." Ford made statements to this effect to Morgan, and to other female employees throughout Morgan's employment at ACMI. After telling Morgan "that she had not had a real man until she had him," Ford began to spend long periods – up to three or fours hours at a time – at Morgan's work station. While there, he would scrutinize the minutiae of Morgan's work, and engage her in unwanted conversation. During one of these episodes, Ford boasted that Charles Burden, ACMI's Superintendent and another defendant in this case, had told him that "[Ford] could not get his pussy and his paycheck in the same place," but that "what [Burden] doesn't know won't hurt him." On occasions, Ford remarked that "there is a thin line between love and hate and someday [Morgan] will realize that [she] love[s] [Ford]," or words to that effect. Once, while on her way to a party for ACMI employees, Ford told Morgan that she looked good in her dress and that he "could imagine her without it."

Ford's conduct troubled Morgan. She claims that after sharing her concerns about Ford with a fellow officer one evening at work, she discovered that Ford had electronically monitored her conversation.

After Morgan had been on the job for six months, Ford changed shifts and no longer supervised Morgan's work. Although they saw each other infrequently, Ford's troubling behavior did not cease; he continued to comment on his virtues.

In 1987, Morgan left ACMI for several weeks to go on military leave. Upon her return, Ford again served as her supervisor. At her annual evaluation, in June of 1987, Ford rated her 3.4 on a 5-point scale.

In September 1987, one of Morgan's co-workers, Sheila Parrish, lodged a sexual harassment complaint against Ford with Superintendent Burden. In her complaint, Parrish cited Ford's unwanted attentions and habitual sexually suggestive comments. Parrish identified Morgan as a witness who could substantiate her allegations.

At Burden's request, Morgan met with Burden to discuss Ford's actions toward Parrish. At that meeting, Morgan told Burden about Ford's behavior – toward her as well as Parrish. Burden suggested that Morgan take her charges to the Department's Internal Affairs Division, which she promptly did.

Ford soon learned of Morgan's meeting with Burden, and within two weeks he took action against her. Ford disciplined Morgan for failing to respond to an "officer needs assistance" call, although a witness testified to the contrary. Ford then instructed lieutenants with supervisory authority over Morgan to watch her closely and to write her up for the smallest of infractions. Shortly thereafter, Lieutenant Tydus Meadows, another defendant before us, disciplined Morgan for being rude to a visitor; he did so in the face of a witness' testimony that she had not been rude.

In early October 1987, Internal Affairs completed its investigation and sent a report thereof to Burden. After reading the report, Burden concluded that Morgan had

not been sexually harassed. On October 9, 1987, he informed Morgan in writing that she had not established her claims of sexual harassment and admonished her against bringing false claims against her supervisors. He warned her that she would be disciplined for any further "misconduct." Burden also wrote to Ford. He told Ford that although there was no finding of sexual harassment, he should not "plac[e himself] in a position which could be construed as personal." Burden took no other action in the matter.

On November 3, 1987, Ford gave Morgan an interim rating of 2.6 on a scale of 5, significantly lower than the rating he had given her in June. An interim review is an extraordinary procedure which is used to register a supervisor's strong impressions of an employee's performance. Ford gave Morgan a 2.6 rating because, he said, she had exhibited a poor attitude and was uncooperative. On November 9, 1987, Morgan filed a sexual harassment charge against Ford with the Georgia Office of Fair Employment Practices. When notified of the charge, Ford told Morgan to drop it because "no one would believe. her." Immediately thereafter, Morgan found herself reassigned to the more distasteful duties around the compound. Ford assigned Morgan to the guard tower although she did not have a proper weapons certification, to the unit for AIDS patients, and to the housing ward for violent inmates.

Ford's supervision of Morgan ended in November 1987. Although Ford no longer had direct control over her, Morgan claims that he continued to engage other officers to make her working environment unpleasant. In April 1988, Morgan resigned. In August 1989, the Office

of Fair Employment Practices issued a finding of reasonable cause to believe that the Department had discriminated against Morgan and had retaliated against her for opposing perceived discriminatory practices.

On October 6, 1989, Morgan brought this suit against Ford, Meadows, and Burden in their individual and official capacities,[1] seeking compensatory and punitive damages, under 42 U.S.C § 1983,[2] for retaliating against her for complaining, purportedly in the exercise of her First Amendment right of free speech, about sexual harassment against her in the workplace. On January 30, 1990, Morgan filed an Amended Complaint adding Robert Whitworth, in his official capacity as Commissioner of the Georgia Department of Corrections, as a party defendant, and seeking an order requiring Whitworth to reinstate her to the job she left because of the harassment she had received at the hands of Ford, Meadows and Burden. On April 12, 1990 Morgan again amended her Complaint,

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[1] Morgan also sued David Evans in his official capacity as Commissioner of the Georgia Department of Corrections. She dropped him from the case when Robert Whitworth assumed that position.

[2] Section 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within, the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983.

adding the Department of Corrections as a party defendant and seeking an order, under Title VII, requiring the Department to reinstate her to her position.[3]

After the parties joined issue and engaged in considerable discovery, the district court granted the defendants summary judgment. Morgan now appeals.

II.

In the discussion that follows, we first address Morgan's First Amendment claims for damages against Ford, Meadows and Burden. We then turn to Morgan's Title VII claim.

A.

Morgan claims that Ford, Meadows and Burden abridged her First Amendment right to free speech after she complained to Burden,[4] the Internal Affairs Division, and the Georgia Office of Fair Employment Practices that she was being harassed in the workplace. We agree with the district court that Morgan suffered no constitutional deprivation.

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[3] Morgan also seeks such relief from Whitworth. Because, for purposes of this Title VII claim, Whitworth and the Department are essentially one and the same, we refer to them hereafter collectively as the "Department."

[4] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const. amend. I. This right was made applicable to the states by the Fourteenth Amendment, *Everson v. Board of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 507-08, 91 L.Ed. 711 (1947).

A state may not demote or discharge a public employee in retaliation for protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989) (citing *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). This circuit has developed a four-part test to determine whether an employee suffered such retaliation. First, a court must determine "whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern.' " *Bryson*, 888 F.2d at 1565 (quoting *Rankin*, 483 U.S. at 384, 107 S.Ct. at 2896-97 (citation omitted)). *See also Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir.1988); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). If so, the district court must "weigh[ ] the employee's first amendment interests against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* (citing *Pickering v. Board of Educ.*, 31 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968)). Should the employee prevail on the balancing test, "the fact-finder determines whether the employee's speech played a 'substantial part' in the government's decision to demote or discharge the employee." *Id.* (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Finally, if the employee shows that the speech was a substantial motivating factor in the employment decision, "the state must prove by a preponderance of the evidence that 'it would have reached the same decision . . . even in the absence of the protected conduct.' " *Id.* at 1566 (quoting *Mount Healthy*, 429 U.S. at 286, 97 S.Ct. at 576).

Applying this four-part test, we first examine whether Morgan's speech related to a matter of "public concern."

Morgan contends that her speech – the complaints of sexual harassment – involves a public concern, because sexual harassment in the workplace is a matter of vital social interest.

To fall within the realm of the "public concern," an employee's speech must "relat[e] to a [ ] matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Absent extraordinary circumstances, however, First Amendment protection remains unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . ." *Id.* at 147, 103 S.Ct. at 1690. A court must therefore discern the purpose of the employee's speech – that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee. *Id.* at 146, 103 S.Ct. at 1690; *Kurtz*, 855 F.2d at 730; *Ferrara*, 781 F.2d at 1515-16. To accomplish this, a court considers "the content, form and context of a given statement, as revealed by the whole record." *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir.1991) (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690). A court may consider the employee's attempts to make the concerns public,[5] along

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[5] We understand that a court cannot determine that an utterance is not a matter of public concern *solely* because the employee does not air the concerns to the public. *Deremo*, 939 F.2d at 911 n. 3 (citing *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988)). The employee's attempt at public disclosure nonetheless remains a relevant factor in determining whether the speech was a matter of public concern. *Id.*; *see also Kurtz*, 855 F.2d at 729; *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986).

with "the employee's motivation in speaking." *Id.* at 911 (citations omitted).

While we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, "the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." *Kurtz*, 855 F.2d at 727 (quoting *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir.1986)). Rather, we must determine whether the purpose of Morgan's speech was to raise issues of public concern, on the one hand, or to further her own private interest, on the other. *See Deremo*, 939 F.2d at 912 (employees' request for compensation for remaining silent about sexual harassment did not constitute a matter of public concern); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987) (employee's private complaints of sexual harassment were not matter of public concern); *see also Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir. 1993) (male co-worker's verbal support for victims of sexual harassment constituted speech touching upon a public concern).

In the case at hand, Morgan's speech largely focused upon how Ford behaved toward her and how that conduct affected her work. The speech that Morgan cites is in the form of complaints to official bodies – the Superintendent of ACMI, Internal Affairs, and the Office of Fair Employment Practices. She did not relate her concerns about sexual harassment to the public[6] or attempt to

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[6] *See Martinez v. City of Opa-Locka*, 971 F.2d 708, 710 (11th Cir.1992) (providing testimony regarding the public disposition

involve the public in any manner. Morgan's expressions "in no way dr[ew] the public at large or its concerns into the picture." *Pearson v. Macon Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279 (11th Cir.1992). The record shows that Morgan's speech was driven by her own entirely rational self-interest in improving the conditions of her employment. Her complaints about Ford's behavior, as serious as they were, centered around her private matters not matters of social interest. As an employee grievance, Morgan's speech was not a matter of public concern. *See Connick*, 461 U.S. at 146-47, 103 S.Ct. at 1690; *Ferrara*, 781 F.2d at 1512; *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984).[7]

That Morgan spoke on behalf of Sheila Parrish regarding Ford's harassing behavior does not change the

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of money); *Stough v. Gallagher*, 967 F.2d 1523, 1524, 1528 (11th Cir.1992) (campaigning publicly for sheriff candidate); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1506 (11th Cir.1990) (expressing opposition to tax referendum at Superintendent's meeting); *Williams v. Roberts*, 904 F.2d 634, 638 (11th Cir.1990) (publishing criticism of budget proposal); *see also Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988) (giving television interview about experiencing racial discrimination on the State Police Force).

[7] Our statement in *Deremo* is not to the contrary. There we stated in dicta that "[w]e assume that an employee's complaint to a superior reporting the wrongful conduct of a public official, including sexual harassment, would ordinarily be a matter of public concern." *Deremo*, 939 F.2d at 912. While we agree that the general subject of sexual harassment in the workplace is a matter of public concern, each complaint must be assessed on a case-by-case basis. We will not permit an employee to manufacture First Amendment protection (thereby job security) by complaining on a matter related to a social concern.

outcome. An employee's speech will rarely be entirely private or entirely public. Rather than categorize each phrase the employee uttered, we "consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." *Kurtz*, 855 F.2d at 727 (citing *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690); *see Pearson*, 952 F.2d at 1278 ("Pearson's complaints primarily pertained to . . . [her employee grievance]. It was only incident to speaking on these concerns that [her] remarks touched on [what could be considered a public concern.]"). Considering the entire record, we conclude that Morgan primarily spoke as an employee in order to improve her work environment. While she did speak about her co-worker's plight, which contains a public concern aspect, *see Marshall*, 984 F.2d at 796, the main thrust of her speech took the form of a private employee grievance. Summary judgment on Morgan's section 1983 claim was therefore appropriate.

B.

Morgan claims that she was constructively discharged by the Department in violation of Title VII.[8] "[W]hen an employee involuntarily resigns in order to escape intolerable and illegal employment requirements to which he or she is subjected because of race, color,

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[8] Title VII in pertinent part, makes it "an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . . " 42 U.S.C. § 2000e-2(a)(1).

religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII." *Henson v. City of Dundee*, 682 F.2d 897, 907 (11th Cir.1982) (quoting *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir.1975) (internal quotation marks omitted)). Moreover, a plaintiff "must demonstrate that [her] working conditions were so intolerable that a reasonable person in [her] position would be compelled to resign." *Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1317 (11th Cir.1989) (citations omitted); *see also Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir.1991); *Wardwell v. School Bd. of Palm Beach County*, 786 F.2d 1554, 1557 (11th Cir.1986).

As we have noted, Ford supervised Morgan on two separate occasions. During his first stint as supervisor, in 1984, Ford repeatedly, albeit indirectly, invited Morgan out. Moreover, Ford's inquiries continued even after Morgan had stated that she was not interested in forming a personal relationship with him. Once rebuffed, Ford proceeded to direct completely inappropriate and suggestive remarks at Morgan. In the guise of supervising her work, Ford hovered about her for hours at a time. In this way, he was able to subject Morgan to his unwanted personal attentions. In 1985, Ford rotated to another shift and was no longer Morgan's direct supervisor. Ford and Morgan had much less contact with each other, and most of Ford's inappropriate behavior stopped.

During the second period of supervision, Ford's undesired attentions and reports of masculine virility resumed. Ford's pervasive attention disturbed Morgan,

and she complained to Superintendent Burden. After concluding that her charges had not been substantiated, Burden warned Ford to be careful. Ford, having been reprimanded for misconduct before, apparently took the admonition to heart. Ford thus turned from lavishing unwelcome personal attention on Morgan to other methods of making her life miserable. When Ford's supervision of Morgan ceased again, in late 1987, the harassment did not stop. Ford had his co-workers send Morgan messages telling her to drop her charges because "no one would believe her." Additionally, Morgan faced the real possibility that at some point Ford would once again become her immediate supervisor. To preclude this from happening, Morgan resigned her position.

We conclude that a material question of fact remains as to whether Morgan's employment conditions were "intolerable." Accordingly, the district court erred in granting the Department's motions for summary judgment on Morgan's claims for reinstatement with back pay and fringe benefits.

III.

We affirm the district court's grant of summary judgment for Ford, Meadows and Burden. We vacate the grant of summary judgment for the Department, and remand the case for further proceedings not inconsistent herewith.

IT IS SO ORDERED.